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No. 91-1542

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FANTASY, INC., d/b/a
JONDORA/PARKER MUSIC,
Petitioner,
vs.
JOHN MARASCALCO, d/b/a
ROBIN HOOD MUSIC,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* TWENTIETH CENTURY FOX FILM CORPORATION, TURNER ENTERTAINMENT CO., COLUMBIA PICTURES INDUSTRIES, INC., and TRI-STAR PICTURES, INC., IN SUPPORT OF PETITIONER

WALTER COCHRAN-BOND
Counsel of Record
JON A. BAUMGARTEN
CAROLE E. HANDLER
LOIS D. THOMPSON
PROSKAUER ROSE GOETZ & MENDELSOHN
2121 Avenue of the Stars, Suite 2700
Los Angeles, California 90067
(310) 557-2900
Attorneys for Amici Curiae

(Additional counsel listed on back of cover)

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

OF COUNSEL
PROFESSOR ROBERT A. GORMAN
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-5000

MARY ANNE HARRISON, ESQ.
Senior Vice President and
Assistant General Counsel
WILLIAM H. LOCKARD, ESQ.
Counsel and Director, Copyright/Trademark
TWENTIETH CENTURY FOX FILM CORPORATION
Administration Building, Room 110
10201 West Pico Boulevard
Los Angeles, CA 90035
(213) 203-1527

ANNE R. GRUPP, ESQ.
Vice President - Litigation
TURNER ENTERTAINMENT CO.
1888 Century Park East, 12th Floor
Los Angeles, CA 90067
(310) 788-6920

JARED JUSSIM, ESQ.
Executive Vice President
VICKI SOLMON, ESQ.
Senior Vice President and
Assistant General Counsel
COLUMBIA PICTURES INDUSTRIES, INC.
TRI-STAR PICTURES, INC.
10202 West Washington Boulevard
Culver City, CA 90232
(213) 280-8000

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Applicants[1] respectfully move for leave to file the attached brief in this case *amici curiae*. The consent of counsel for the Petitioner has been obtained, but counsel for Respondent has refused consent.

Applicants produce and distribute motion pictures and television programs. These works are often produced from or incorporate other works -- plays, books, musical compositions -- protected by the copyright laws of the United States. Applicants' authority to make these motion pictures and programs or utilize such works is derived from the validity of the copyrights held by the owners of the underlying creative works.

The ruling in this case by the Court of Appeals and the submissions to this Court from the parties address only the particular interests of those who desire ownership of a particular renewal copyright. Applicants seek to present the views of those whose creative works derive from or incorporate such original works. The ability of Applicants to utilize these original stories, novels, or musical compositions is undermined by the holding of the Court of Appeals. That opinion creates great uncertainty with respect to the ownership and exploitation of music and separately copyrighted material that might be incorporated into such works. Contrary to the clear statutory language, the Court of Appeals' ruling requires a renewing author to live into the commencement of the renewal term notwithstanding the fact that the author may have already

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[1]Twentieth Century Fox Film Corporation, Turner Entertainment Co., Columbia Pictures Industries, Inc., and Tri-Star Pictures, Inc.

applied for a renewal of the copyright and received a certificate attesting to this renewal from the Copyright Office. Applicants will be unable to determine whether the author will live into the renewed term and experience the vesting of the renewal copyright in an incorporated original work, nor will they know with which of the author's heirs or successors to negotiate for their rights of exploitation.

TIMELINESS OF THIS MOTION AND AMICI BRIEF

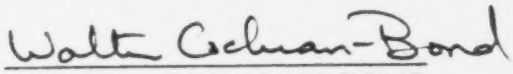
This Motion and Brief were filed by first-class mail pursuant to Supreme Court Rule 29.1 and postmarked April 24, 1992. This date is 30 days after the Petition for Writ of Certiorari was received and docketed by the Clerk of the Supreme Court on March 25, 1992. Although Rules 37.2 and 15.2 state that an *amicus curiae* brief must be filed within 30 days of the actual date of receipt of the Petition by Respondent, Respondent's counsel has not been forthcoming in providing this date. *See* Declaration of Carole E. Handler at ¶¶ 1-8. After telephone calls to the Clerk's Office, Applicants submit that this Motion and Brief have been timely filed as they have been sent to the Clerk by first-class mail and postmarked within the 30 day time period that began with the receipt of the Petition by this Court.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, Amici respectfully request this Court to grant the Petition and consider on its merits the issue presented for review.

Dated: April 24, 1992

Respectfully submitted,



WALTER COCHRAN-BOND
Counsel of Record

PROSKAUER ROSE GOETZ &
MENDELSOHN
JON A. BAUMGARTEN
CAROLE E. HANDLER
LOIS D. THOMPSON
Counsel for *Amici Curiae*

DECLARATION OF CAROLE E. HANDLER IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

I, CAROLE E. HANDLER, declare:

1. I am an attorney and a partner in the law firm of Proskauer Rose Goetz & Mendelsohn, attorneys for Applicants Twentieth Century Fox Film Corporation, Turner Entertainment Co., Columbia Pictures Industries, Inc., and Tri-Star Pictures, Inc. The facts herein are of my own personal knowledge, and if called upon to do so, I could and would competently testify thereto.

2. It is my understanding of Supreme Court Rules 37.2 and 15.2 that a potential *amicus curiae* has thirty days after Respondent receives the Petition for Writ of Certiorari -- the same amount of time Respondent has to oppose a petition -- in which to file its *amicus* brief and motion.

3. I directed Michael R. Wilner, an attorney at my law firm, to contact the company that printed the Petition to determine on what date Respondent received the brief. The printer, Lawyers Brief Service, sent the Petition to Respondent on March 23, 1992, by first-class mail from Los Angeles, California. The printer did not request a return receipt showing the date Respondent in fact received this Petition.

4. First-class mail sent from another address in Los Angeles generally takes at least two days (often three) to arrive in my office. Respondent's

counsel's mailing address is in a similar commercial urban neighborhood near my office.

5. Mr. Wilner spoke with several personnel in the Office of the Clerk of the Supreme Court. They directed him to contact Respondent's counsel directly and ask on which date the Petition was received. On April 23, 1992, I telephoned Evan Cohen of the law firm Cohen and Luckenbacher, attorney for Respondent, to obtain this information. He told me that there was no stamp or other marking on the brief to indicate the date on which it was received. Mr. Cohen stated, however, that, because the petition had been mailed on March 23, he "assumed" that he received it on March 24, without providing any support for this statement.

6. Later that day, Mr. Cohen stated to me, after expressing his lack of consent to the filing of a brief *amicus curiae* by Applicants, that he "knew" that he had received the Petition on March 24, 1992.

7. Upon further questioning of Mr. Cohen and his co-counsel by telephone and fax, Respondent still could offer no proof showing on which date it received the Petition.

8. Mr. Wilner again called the Clerk's Office at my direction. He explained the circumstances in this matter to the Chief Deputy Clerk of the Court, Frank Lorson. Mr. Lorson informed us that the Clerk's Office received the Petition by mail and docketed it on March 25. He suggested that, because we were unable to determine a date certain from Respondent on which it received the Petition, we could request the Court to find this Motion and Brief timely filed as it has been filed with the Court by

mail within 30 days of the date on which the Court received the Petition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 24th day of April, 1992, at Los Angeles, California.

Carole E. Handler

CAROLE E. HANDLER

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

"Congress' paramount goal in revising the 1976 [Copyright] Act [was to] enhanc[e] predictability and certainty of copyright ownership." *Community For Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 109 S.Ct. 2166, 104 L. Ed. 2d 811 (1989) (hereafter "*CCNV*") (citing H.R. Rep. No. 94-1476, p. 129 (1976)). This Court should grant the Petition for Writ of Certiorari to resolve a conflict between the circuits, give force to the plain meaning of the Act, and thereby restore to that Act the predictability and certainty Congress strove so mightily to attain.

Amici, who regularly acquire from authors licenses in works that are subject to copyright, recognize that as a consequence of this Court's decision in *Stewart v. Abend*, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990), they cannot be certain that they actually have acquired rights to a copyrighted work in its renewal term unless the author lives to the renewal period. Courts in the Second Circuit have determined that the operative event which vests those renewal rights is the filing of the renewal application with the Copyright Office; the Ninth Circuit now says it is survival to the beginning of the renewal term. Amici request that the writ of certiorari be granted to resolve that conflict.

They urge this Court to reject the Ninth Circuit's view of when the right to the renewal term vests both because it could well have the unintended effect of casting works into the public domain and because it reduces predictability and certainty of copyright ownership. Since, under the Ninth Circuit's view, filing of a renewal application during the one-year renewal period proceeding

the commencement of the renewal term is not sufficient to vest the renewal rights, if a filing author dies before the renewal term, no one will have the renewal rights, and the work then will enter the public domain. If, to avoid that possibility, all possible successors also file renewal applications, no one thereafter searching the records of the Copyright Office will be able to determine from the face of those official records who actually holds the rights.

ISSUE PRESENTED

The issue presented is straightforward: does the right to a renewal copyright vest in an author on the date when the copyright certificate is issued upon timely application, assuming the author is alive on that date and has filed for renewal during the appropriate statutory period, or does the right vest only at the commencement of the renewal term, provided that the author survives into that term? The Ninth Circuit held that renewal is not sufficient to vest the right to renewal copyright. Rather, the Court held, filing of the renewal is a condition precedent. The renewing author also must live into the commencement of the renewal term.

INTEREST OF AMICI

Amici produce and distribute motion pictures and television programs. While many of their productions are entirely original works, large numbers of the motion pictures and television programs they produce are derivative works based on novels, short stories, or other works that are subject to copyright. Additionally, many of the motion pictures and television programs they produce incorporate music and songs that have been separately created and are subject to copyright protection. Amici license these musical works for use in the motion pictures

and television programs they produce. Amici also own substantial television and film libraries.

The Ninth Circuit's decision affects their business in at least three ways.

(1) *New Works* - As noted, Amici frequently acquire the rights to novels, short stories, or other works on which to base their television programs and motion pictures, and incorporate contemporary popular music into those productions. If the Ninth Circuit decision stands, given the number of years and substantial financial investment it takes to develop and fully exploit a television series or motion picture, Amici are less likely to consider securing rights in any works published between 1964 and 1978 (that is, works presently in their initial term of copyright and eligible for future renewal) because they cannot be certain that they will be able to exploit for a commercially reasonable period of time their own motion pictures and television programs that incorporate other works whose copyrights will expire. In fact, in some circumstances, Amici have elected not to license such works, notwithstanding they would prefer to do so. The effect of the Ninth Circuit decision, therefore, is to restrict Amici's artistic choices and to depress the value of literary work and music created between 1964 and 1978 since Amici and others in the motion picture and theatrical industry are less likely to participate in any significant market for such works.

(2) *Clearing of Rights* - When Amici acquire motion pictures for distribution, commence the production of motion pictures or television programs, or seek to incorporate music or other copyrighted materials into their own work product, they regularly "clear" the rights in those materials. Amici frequently do not obtain their rights

of exploitation directly from the author of a work. Rather, they often secure those rights from other licensees whose existence and licenses do not necessarily provide information concerning the status of the author. They "clear" those rights by searching the records in the Copyright Office.

If the Ninth Circuit decision stands, such a search will not be sufficient to assure the existence of the desired rights. Amici, and those similarly situated, will not be able to determine from the face of the records of the Copyright Office whether an author who renewed his copyright during the renewal period survived into the renewal term and thereby experienced the actual vesting of such rights.

Further, if the Ninth Circuit's ruling leads to multiple filings during the renewal period, a search of the records will not permit one readily to determine who holds the rights. Amici's ability to conduct their business and the reliability of the Copyright Office's records both will have been impaired.

(3) *Libraries* - To the extent Amici have in their libraries motion pictures and television programs the public wishes to view, the risk of continuing to exploit these works becomes financially prohibitive and the public is denied access if there is enhanced uncertainty concerning the ownership of music and other separately copyrighted material that may be incorporated in those works. The Ninth Circuit decision adds to the uncertainty since Amici cannot be confident that an author who renewed his copyright in such an incorporated work in its twenty-eighth year lived to the twenty-ninth year. Amici therefore cannot be certain that they will be permitted to exploit the incorporated work at all or on the terms negotiated with the author should the author not have survived into the renewal

term. Since many motion pictures incorporate a number of different musical works copyrighted at different times by different authors, the problem Amici confront is that much more complex.

ARGUMENT

INTRODUCTION

The Ninth Circuit held that the right in the renewal copyright vests only at the commencement of the renewal term, provided the author has survived into that term. That holding is at odds with the plain meaning of the statute, the legislative history of the 1976 Copyright Act, and the views of the commentators, including, significantly, the Register of Copyrights at the time the 1976 Act was debated and approved. Certiorari should be granted and the Ninth Circuit's holding reversed because it leads to a result that confounds, rather than promotes, the congressional goal of predictability and certainty of copyright ownership.

A. THE LANGUAGE OF THE STATUTE

The statute before the Court is Section 304(a) of the 1976 Copyright Act. 17 U.S.C. § 304(a). "The starting point for . . . interpretation of a statute is always its language." *CCNV*, 490 U.S. at 739 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)). Yet, when it engaged in its own interpretation of Section 304(a), the Ninth Circuit ignored an important portion of

that statute. The full text of the section is set out in footnote 1, with the critical language underscored.[1]

Focusing only on the second proviso of § 304(a) (which commences with the language "*And provided further*"), the Ninth Circuit concluded that the language stating that the renewing party "shall be entitled to a renewal . . . when application for such renewal . . . shall have been made" specified the time for registration, but not

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[1]Section 304. Duration of copyright: Subsisting copyrights.

(a) Copyrights In Their First Term on January 1, 1978. - Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

the time of vesting of the renewal right. The court further concluded that the phrase in that section, "shall have been made," modified the word "when," and signified "that filing of a renewal application is a condition precedent to vesting". Finding that the statutory language was susceptible to more than one interpretation, the court then turned to an analysis of legislative history and the writings of certain commentators to conclude that vesting occurred only if the author survived to the commencement of the renewal term. ("Although commentators disagree, the better view is that § 304(a) implicitly reflects the vesting language of earlier statutes, requiring an author to survive to the start of the renewal term in order for the renewal copyright interest to vest in his assignees." *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 471 (9th Cir. 1991).)

Other courts and commentators who have studied that same statutory language have found its language clear. In *Frederick Music Co. v. Sickler*, 708 F. Supp. 587, 589 (S.D.N.Y. 1989), the district court succinctly stated: "The language of the statute is clear. . . . To this Court, the language of the statute is unambiguous and thus needs no clarification for legislative history." Professor Goldstein concurs: "The plain language of section 304(a) suggests that vesting occurs on the date the renewal is registered . . . ." 1 P. Goldstein, *Copyright: Principles, Law and Practice* § 4.8.1, at 451 (1989).

The flaws in the Ninth Circuit's statutory interpretation become apparent when one treats § 304(a) as a whole. Precisely the same "shall have been made"/"when" language used to govern renewal by the author (or the widow, widower, or the children of the author, etc.) also was included by Congress in that portion of the statute governing renewal of a copyright held by a corporate body, an employer for whom such work is made

for hire, etc. (The concern for successors found determinative by the Ninth Circuit clearly is of no relevance to the first proviso, although the language is the same in both.) There has been no suggestion that the time for issuance of a certificate, upon timely application for renewal, and the time of vesting of the renewal rights are bifurcated when a corporate body seeks to renew. Nor has it ever been suggested that a renewing corporate copyright owner must refrain from changing its corporate structure or engaging in a merger between the time of renewal and the commencement of the renewal term lest the successor or surviving corporation find itself bereft of its copyrights because the renewing corporation had not survived until the commencement of the renewal term.

Since the operative language is identical, there is no basis on which to conclude that when applied to corporate holders of copyright that language covers both the act of renewal *and* the vesting of the renewal copyright but, when applied to human beings, the language creates only a condition precedent to vesting.

That a renewing human being need not both file an application of renewal *and* survive to the commencement of the renewal term in order to have secured the renewal copyright is further confirmed by the concluding proviso of § 304(a) ("*and provided further*, that in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured"). Had Congress intended to require the human being seeking to renew to survive until the commencement of the renewal term, this last proviso should have stated "in default of the registration of such application for renewal and extension *and in default of the survival of the author of such work, or the widow,*

widower, or children of the author, etc. until the commencement of the renewal term, the copyright in any work shall terminate. . . ." 17 U.S.C. § 304(a) (emphasis added). Plainly, however, no such language appears in the statute and may not be implied in the face of Congressional silence.

Presented with provisions of the Copyright Act relating to works for hire, this Court in *CCNV* unanimously considered and rejected an argument that it rely on legislative silence in interpreting the 1976 Copyright Act. Petitioners there, like the Ninth Circuit here, contended that Congress' failure to state, either in the Act itself or in the legislative history, that it intended to jettison a position suggested that it intended no such result. This Court demurred, writing, "We are unpersuaded. Ordinarily, 'Congress' silence is just that -- silence.'" *CCNV*, 490 U.S. at 749 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987)). Here too, silence is just that, not an implicit perpetuation of a requirement once explicitly stated in the Act.

The statute is clear. It provides that vesting of the renewal copyright occurs upon the issuance of a certificate of renewal upon timely application to the Copyright Office, not survival until the commencement of the renewal term. Therefore, this Court may well conclude that it need not rehearse the applicable legislative history. Should it nonetheless undertake an analysis of that legislative history, it quickly will conclude that the Ninth Circuit's understanding of the legislative history was as flawed as its reading of the statute.

B. THE LEGISLATIVE HISTORY

1. Changes in the Act Over Time

In its opinion, the Ninth Circuit quoted the renewal provisions contained in all the copyright acts that preceded the 1976 Copyright Act. While it noted that the Act of 1870,[2] unlike its predecessors, failed expressly to require that an author must be alive at the beginning of the renewal term in order to continue to enjoy "the same exclusive rights" enjoyed during the original term, it quoted commentators to the effect that no substantial changes were intended in that act and concluded that survival into the renewal term therefore remained an implicit requirement for renewal. In so holding, the court overlooked the significant shift from earlier Acts, which embodied a public interest in releasing works into the public domain, to the 1870 Act, which focused not on whether a copyright would be renewed at all, but rather, on who would own that renewed copyright. With the 1909 Act, Congress extended the period for applying for renewal from six months to one year.

If, in fact, Congress had intended to require an author to survive until the commencement of the renewal term in order for the interest in the renewal copyright to vest, it simply makes no sense for Congress also to have expanded the time in which the author could file an application for renewal with the Copyright Office. Under the Ninth Circuit's interpretation, even if the author were to renew on January 2 of the renewal year, no commercially significant exploitation of the work could occur for twelve months, until after December 31 of that year since no motion picture producer, no book publisher,

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[2]Act of July 8, 1870, ch. 230, 16 Stat. 212.

occur for twelve months, until after December 31 of that year since no motion picture producer, no book publisher, no music publisher, etc. could be certain that its license to exploit the work would remain effective if the author died anytime between January 2 of the renewal year and the end of that year.

Presumably, in extending the period in which renewal applications could be filed, Congress recognized that the value of a copyrighted work diminishes as the copyright term nears its end and that commercial exploitation and availability of the copyrighted work will be enhanced the sooner the copyright can be renewed. However, if an author who indeed renews his copyright early in the renewal period has no vested rights in that renewal until he has survived through that whole year and into the renewal term, his early renewal will have been for naught. No commercial ventures, including the motion picture studio amici, will invest money to acquire rights in or to exploit a work if they cannot be certain that they will be able to enjoy the fruits of that investment for longer than one year.

2. The Drafting of the 1976 Act

The Ninth Circuit's discussion of the legislative history of the 1976 Copyright Act also reveals that its understanding of the genesis of that Act is extremely limited, and incorrect. This is particularly apparent in its dismissive attitude toward Barbara Ringer's statement, written in 1960, and published as part of the Copyright Law Revision Study of the Senate Judiciary Committee, to the effect that "[a]s soon as a valid renewal claim is registered, the renewal is 'vested in interest' [creating] a 'present fixed right of future enjoyment.'" In refusing to consider this view, the Ninth Circuit stated: "The primary

difficulty with this argument is that the Ringer study was presented to the 86th Congress, not to the 94th Congress, which passed the 1976 Act some sixteen years later." But the Ninth Circuit ignored the fact that the language of Section 304 did not change at all during that period. It also ignored the near identify of the renewal provisions of the 1909 and 1976 Acts.

This Court, however, has recognized that the 1976 Copyright Act "was the product of *two decades* of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress." *CCNV*, 490 U.S. at 743 (emphasis added). Significantly, at the time of the adoption of the 1976 Copyright Act, Ms. Ringer effectively *was* the Copyright Office, serving as the Register of Copyrights during the entire period the 1976 Act was being debated and approved.[4] *See also* H.R. Rep. No. 94-1476 at 47-48 (1976) (discussing the publication of 35 monographs on most of the major substantive issues in copyright revision through 1961, the role of the Copyright Office and the reports prepared by the Register of Copyrights, all culminating in the 1976 Act).

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[4]Although Ms. Ringer's position and significant role with respect to the adoption of the 1976 Act does not appear to be a matter of record in this proceeding, this Court may take judicial notice (as per Fed. R. Evid. 201) of the fact that she served as Register of Copyrights from 1973 to 1980 and had worked in the Copyright Office before that period almost continuously since 1949. *See Barbara Ringer Named Register of Copyrights*, Pat. Trademark & Copyright J. (BNA) No. 144, at A-21 (Sept. 13, 1973); *Copyright Office Appoints New Register*, Copyright L. Rep. (CCH) ¶ 20,073 (May 4, 1980).

C. COMMENTATORS

As demonstrated in the Petition for Writ of Certiorari, virtually every commentator who has considered the subject has concluded that the renewal copyright vests upon filing with the Copyright Office. (Petition at 25-28.) Significantly, in his treatise entitled *Copyright: Principles, Law and Practice* (1989), Professor Paul Goldstein of Stanford University Law School looks at the very language from Section 304(a) of the 1976 Act considered by the Ninth Circuit ("the author . . . if still living . . . shall be entitled to a renewal and extension . . . when application for such renewal and extension shall have been made. . . .) and concludes, "The plain language of section 304(a) suggests that vesting occurs on the date the renewal is registered. . . ." 1 P. Goldstein, *Copyright* § 4.8.1, at 451.

Goldstein goes on to observe that there are dicta in some cases to suggest that vesting does not occur until the beginning of the renewal term itself. (This, obviously became the holding of the Ninth Circuit.) He then concludes that this result "is so impractical that Congress probably did not intend it." *Id.* at 452. He describes the impractical consequence as follows

> Until the beginning of the renewal term, there would be no way to know who was the proper applicant for renewal. Under this approach, if the author applied for renewal in the twenty-eighth year but died shortly before year's end, the renewal would not vest in her. At the same time, the proper successor class -- her widower or children -- might not have the time to obtain a

> registration entitling them to the renewal term.

Id. at 451-452. Ironically then, the net effect of the approach adopted by the Ninth Circuit might well be to deprive the very class the court sought to protect of any right to the work, because there would be no vested renewal, and the work would be cast into the public domain.

The only commentator to suggest that Section 304(a) of the 1976 Act might require survival by the renewing author into the renewal term in order for ownership in the renewal copyright to vest is Melville B. Nimmer. Nimmer bases this conclusion largely on his reading of *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 63 S. Ct. 773, 87 L. Ed. 1055 (1943). As Nimmer himself recognized, however, that case does not expressly address the question of when rights in a renewal copyright vest and, in any event, was decided well before Congress and the courts had the benefit of the comprehensive research and studies of the United States Copyright Law expressly funded by Congress in 1960 and 1961. *See* 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 9.05[C], at 9-61 (1991); *see also* H.R. Rep. No. 94-553 at 47.

Recognizing the potential problem highlighted by Goldstein for members of a successor class (that is, widows, widowers, children, etc.) under his interpretation of the renewal statute, Nimmer, in his treatise, advises members of such a successor class to file their own claims for renewal during the last year of the initial copyright term "even if members of a prior class have likewise filed such a claim." 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 9.05[C]. This unseemly need to file multiple renewals and the incongruous existence of multiple renewal

certificates that may not be effective hardly can be what Congress intended when, as noted, it undertook to revise the Copyright Act to enhance predictability and certainty of copyright ownership.

D. THE CASES

Although no decision squarely addressed the issue, for years courts in the Second Circuit issued decisions that, in dicta, concluded that the right to a renewal copyright vests upon filing with the Copyright Office during the twenty-eighth year of the initial term. *See, e.g., Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943); *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 259 (S.D.N.Y. 1962); *Rose v. Bourne, Inc.*, 176 F. Supp. 605, 610 (S.D.N.Y. 1959), *aff'd* 279 F.2d 79 (2d Cir.), *cert. denied*, 364 U.S. 880, 81 S. Ct. 170, 5 L. Ed. 2d 103 (1960). Then, in 1989, in *Frederick Music Co. v. Sickler*, 708 F. Supp. 587 (S.D.N.Y. 1989), a district court in that circuit addressed the issue directly and concluded that renewal rights vest upon filing. *Id.* at 592.

The district court in *Frederick Music* first addressed the statutory language, noting that it is unambiguous and imposed no survivorship requirement. *Id.* at 589. With respect to legislative history, the district court pointed out that "the early copyright laws merely conditioned renewal upon the author's survival past a single threshold point . . . [t]hey did not embody the concept of the affirmative right to renew during a statutorily created renewal period." *Id.* at 590. In short, the earlier laws, which embodied the strong public interest in releasing works into the public domain, focused upon whether a copyright would be renewed at all, *not* who would own the renewed copyright. That concept was incorporated in the Act of 1870, which eliminated a survivorship requirement, making a historical

approach based on analysis of the earlier laws inapposite. The reasoning of *Frederick Music* applies to this case and directly conflicts with the Ninth Circuit's approach.

Prior to the decision at issue on this writ, only one court, the Tax Court, reached a contrary conclusion, interpreting the term "renewal period" to mean the copyright renewal term and therefore assuming a survival requirement into the renewal term in order to vest the renewal in a particular statutory class. *Arlen v. Commissioner of Internal Revenue*, 48 T.C. 640 (1967). The *Frederick Music* Court properly determined that in *Arlen*, the issue of when renewal rights vest was not dispositive of the issue presented to that court and, that, in any event, the case primarily concerned tax, as opposed to copyright, matters. It therefore gave that Tax Court ruling little weight.

The *Frederick Music* decision, with its explication of prior Second Circuit cases, clearly reveals a conflict between that circuit and the Ninth Circuit on the issue of when a renewal copyright vests. It is of great importance that the conflict be resolved. The Copyright Act is a federal statute of general applicability and works subject to copyright are exploited, by Amici and others, throughout the country, with no distinction between judicial circuits possible.

CONCLUSION

The grant of the writ of certiorari will permit this Court both to resolve a conflict between the circuits and to restore to authors, their successors, and Amici certainty with respect to an important aspect of copyright ownership under the 1976 Copyright Act. Therefore, for the reasons set forth above and in the Petition for Writ of Certiorari,

Amici respectfully request this Court to grant the Petition and consider on its merits the issue presented for review.

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Respectfully submitted,

WALTER COCHRAN-BOND
Counsel of Record

PROSKAUER ROSE GOETZ &
MENDELSOHN
JON A. BAUMGARTEN
CAROLE E. HANDLER
LOIS D. THOMPSON
Counsel for *Amici Curiae*